No. 84-780

IN THE

Supreme Court of the United States

October Term, 1985

SUPREME COURT, U.S.
FILED
SEP 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Appellants,

v.

STEPHEN J. ROY, et al.,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA, THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLEES

John W. Whitehead
Counsel of Record
James J. Knicely
D. Kevin Shumberry
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0200

Thomas G. Sorrow
The Rutherford Institute
of Alabama
517 North Hull Street
Montgomery, Alabama 36104

Randall E. Bird
William D. Hallberg
The Rutherford Institute
of Georgia
1750 Peachtree Rd., N.W.
Atlanta, Georgia 30309

Tony P. Trimble
The Rutherford Institute
of Minnesota
316 East Main
Anoka, Minnesota 55303

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Jon Bailey
The Rutherford Institute
of Tennessee
720 East Sullivan Street
Kingsport, Tennessee 37660

W. Charles Bundren
The Rutherford Institute
of Texas
6300 Interfirst One
Dallas, Texas 75202

Guy O. Farley, Jr.
The Rutherford Institute
of Virginia
10521 Judicial Place
Fairfax, Virginia 22030

Attorneys for Amici Curiae

TABLE OF CONTENTS

PAGE

Table of Authorities iii

Interest of Amici Curiae 1

Statement of Facts 2

Summary of Argument 3

Argument

I. The Government's Denial of Public Benefits For Little Bird Of The Snow Exerts An Unconstitutional Condition Upon Appellees' Religious Liberty 5

II. The Appropriate Standard In This Case Is The Compelling Interest-Least Restrictive Means Standard Enunciated In *Sherbert v. Verner*, Not The Balancing Approach Set Forth In *Wisconsin v. Yoder* 8

A. The Court Applied The Correct Free Exercise Standard In The Present Case 11

B. Ad Hoc Balancing Is Inappropriate In This Case Because It Inadequately Values An Individual's Right To The Free Exercise Of Religion 14

III. *United States v. Lee* Is Inappropriate For The Resolution Of This Case

A. The Facts of *Lee* Restrict Its Application To Claims Of Tax Exemption Not To Claims For Government Benefits 16

B. *United States v. Lee* Is Sui Generis As A Precedent In Free Exercise Cases 21

Conclusion 24

TABLE OF AUTHORITIES

Cases

PAGE

Braunfeld v. Brown, 366 U.S. 599 (1961) 18, 22, 23

Brown v. State, 669 S.W.2d 441 (Ark. 1984) 10

Delconte v. North Carolina, 65 N.C. Ct. App. 262, 308 S.E.2d 898 (1983) 10

Jacobs Marsh & Sons, Inc. v. NLRB, 676 F.2d 975 (3rd Cir. 1982) 21

Jensen v. Quaring, 53 U.S.L.W. 4787 (U.S. June 17, 1985) 7

Jernigan v. State, 412 So.2d 1242 (Ala. 1982) 10

Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984) 7

Ray v. Cohen, 590 F. Supp. 600 (M.D. Pa. 1984) 6-8, 11-16, 19, 20, 22, 23

Sherbert v. Verner, 374 U.S. 398 (1963) 3, 6, 7, 8, 9, 12-15, 22, 23, 24

Speiser v. Randall, 357 U.S. 513 (1958) 7

State v. Rivinius, 328 N.W.2d 220 (N.D.1982) 10

Thomas v. Review Board, 450 U.S. 707 (1981) 3, 7, 10, 12-14, 18, 22-24

Trenton Ruthers Home for Children v. NLRB, 677 F. 2d 302 (3rd Cir. 1982) 21

United States v. Lee, 455 U.S. 252 (1982) 3, 15, 16, 19-23

West Virginia v. Riddle, 285 S.E.2d 359 (W.Va. 1981) 10

Wisconsin v. Yoder, 406 U.S. 205 (1972) 3, 7, 9, 11, 14

Statutes

26 U.S.C. 1402(g) (1979) 17

Federal Insurance Contributions Act, Pub. L. No. 591, 68A Stat. 415 (1954) 17

Federal Unemployment Tax Act, Pub. L. No. 591, 68A Stat. 439 (1954) 18

Other Sources

Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327 (1969) 14, 15

Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development-Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381 (1967) 3, 12, 14

Mansfield, *The Religion Clauses of the First Amendment Amid the Philosophy of the Constitution*, 72 Calif. L. Rev. 847 (1984) 21

Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 Duke L. J. 1217 ..... 10, 14, 15

Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545 (1983) 11

Note, *United States v. Lee: An Insensitive Approach to the Free Exercise of Religion*, 18 Tulsa L. J. 305 (1982) 9, 15, 22, 23

Note, *United States v. Lee: Limitation on the Free Exercise of Religion*, 28 Loyola L. Rev. 1216 (1982) 22

Shotzer, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 Ky. L. J. 377 (1974) 22

Smith, *The Constitution and Autonomy*, 60 Tex. L. Rev. 175 (1982) 22

IN THE

Supreme Court of the United States

October Term, 1985

No. 84-780

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Appellants,

v.

STEPHEN J. ROY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA, THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLEES

INTEREST OF AMICI CURIAE[1]

This case presents important issues concerning the rights of recipients of governmental benefits. This Court has long recognized the principle that general welfare benefits

[1]Counsel of record to the parties in the case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

must be dispensed without the imposition of special burdens on the free exercise rights of the recipients thereof, particularly when there are less restrictive means to accomplish the governmental objective. In this case, free exercise rights should not be subordinated to the inferior governmental interest in the efficiency or administrative convenience of its welfare system. The Rutherford Institute believes that the decision of the District Court was correct and should be upheld.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, The Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment religious freedoms. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici curiae adopt by reference the statement of facts as set forth in Appellees' brief filed with this Court.

SUMMARY OF ARGUMENT

The mandatory assignment of a Social Security number and the threatened denial of benefits to Appellees constitutes an impermissible burden upon the free exercise of Appellees' religious beliefs. The Government cannot condition the availability of public benefits upon conduct mandated by Appellees religious beliefs, thereby causing them to modify their behavior or violate their beliefs. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981). The governmental

interest in assigning Social Security numbers is not of the "highest order," but is limited, as in *Sherbert* and *Thomas*, to preventing fraudulent welfare claims and maintaining correct claimant information. This interest, unlike those found in *Wisconsin v. Yoder*, 406 U.S. 204 (1972) (universal education) and *United States v. Lee*, 455 U.S. 252 (1982) (payment of taxes), can hardly be described as "compelling." Moreover, the Government has other viable, less restrictive means available to accomplish its objectives. As such, Appellees' sincere religious belief should not be unduly burdened when there are alternative forms to achieve the governmental objectives. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

United States v. Lee, 455 U.S. 252 (1982) is not dispositive in this case. *Lee* involved the paramount governmental interest in preserving the system of taxation. Granting exemption from payment of taxes would otherwise have subjected the governmental revenue base to a wide variety of religious beliefs. In contrast, the present case is limited to the mere administrative concerns of preventing fraudulent claims and erroneous welfare payments.

ARGUMENT

I.

The Government's Denial Of Public Benefits For Little Bird Of The Snow Exerts An Unconstitutional Condition Upon Appellees' Religious Liberty.

In free exercise cases where the Government withholds benefits because of an individual's adherence to religious beliefs, the issue is raised whether the State is withholding benefits on the basis of an unconstitutional condition. To comply with the Government's requirement to obtain benefits would sacrifice free exercise rights to the Government. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development - Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1400 (1967). This Court has struck down unconstitutional conditions in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board*, 450 U.S. 707 (1981), and has consequently exempted claimants from compromising their beliefs for benefits. Otherwise, the State would have "purchased" constitutional rights with its interest in providing welfare benefits. This Court should follow these precedents and exempt Appellees from furnishing their daughter's Social Security number to the welfare department.

This Court succinctly described the debilitating effect of an unconstitutional condition upon a claimant of free exercise rights in *Thomas*. "Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith, or where it denies such a benefit because of conduct mandated by religious belief," the Government wields substantial pressure upon the claimant to modify his conduct and to compromise his religious belief. 450 U.S. at 717-18. In *Thomas*, this Court held that the Government could not withhold unemployment benefits from an individual who asked to be laid off because the

work violated his religious belief. Implicitly, this Court in *Thomas*, relying on *Sherbert*, concluded that for the First Amendment to meaningfully protect religious liberty, it must secure the means of an individual's religious expression. *Id.* at 718. However, the expression must not pose a "substantial threat to public safety, peace, or order." *Sherbert*, 374 U.S. at 403.

Appellee Roy's religious belief impels him to refuse to furnish Little Bird of the Snow's Social Security number to the welfare department. 590 F. Supp. at 605. As in *Sherbert*, the exerted pressure on the eligible beneficiary to conform is "unmistakable." 374 U.S. at 404. With a family at near-subsistence level, no welfare benefits for Little Bird of the Snow, and then no benefits for Little Bird of the Snow's medical expenses, Appellees undoubtedly feel the pressure. 590 F. Supp. at 607. However, Appellees have strictly followed their religious conviction and resisted the pressure. *Id.*[5]

---

[5] Similar to *Thomas* and *Sherbert*, the Government attempted to mold Appellees' conduct into a classification for eligibility. *Id.* at 604. After receiving benefits for Little Bird of the Snow for four months, the welfare department informed Appellee of the Social Security number requirement as "a condition for eligibility for benefits." *Id.* at 605. Appellees offered to cooperate with the welfare department in finding alternative solutions for his refusal to produce the Social Security number. *Id.* However, the welfare department refused the opportunity even after initially forcing Appellees to accept the number's dormancy and then providing the benefits without notifying Appellees of the problem or of the "active" nature of the Social Security number. *Id.*

The Government partially succeeded in classifying Appellees by establishing a Social Security number for Little Bird of the Snow contrary to their wishes. *Id.* at 604. However, Appellee Roy did not modify his belief or practice after realizing the value of the benefits Appellees would lose for Little Bird of the Snow. *Id.* at 605.

In the present case, the Government conditioned the benefits upon Appellee Roy's susceptibility to "'violate a cardinal principle'" of his religious faith for his daughter's welfare. *Sherbert*, 374 U.S. at 406. In *Sherbert* this Court recognized that the Government's "'imposition of such a condition . . . threatened to produce a result which the State could not command directly.'" *Id.* at 405-06, *quoting Speiser v. Randall*, 357 U.S. 513, 526 (1958). Likewise, in the present case, the Government's uniform pattern of identification for applicants does not permit any deviation, even at the expense of violating Appellees' religious liberty, but rather accomplishes indirectly what the State could not otherwise constitutionally command directly. 590 F. Supp. at 605. This is so because viable alternatives exist to further the state's interest. 590 F.Supp. at 613. An unconstitutional condition cannot be justified where there are less restrictive means of achieving the Government's end. *See Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972); *see also Quaring v. Peterson*, 728 F.2d 1121, 1126 (8th Cir. 1984), *aff'd by an equally divided Court, Jensen v. Quaring*, 53 U.S.L.W. 4787 (U.S. June 17, 1985).[9] The Government's interest in preventing fraudulent claims and

---

[9] In *Jensen v. Quaring*, the Eighth Circuit held that Nebraska's Department of Motor Vehicles could not require an applicant to submit to having a photograph taken for affixing on the license if the applicant objected to the photograph based on religious beliefs. The court concluded that the requirement was an unconstitutional burden on Quaring's practice of her belief. 728 F.2d at 1125 (*citing Thomas*, 450 U.S. at 717). Under the court's analysis, the pressure on Quaring was "indistinguishable" from the burden on Sherbert. *Id.*

Moreover, the exemption desired by Quaring would not "impair the state's ability to achieve its objective." *Id.* at 1126. Primarily, the court noted the Government's grant of several selective exemptions

maintaining correct claimant information can be achieved without requiring Little Bird of the Snow's Social Security number. 590 F.Supp. 607. Exempting Little Bird of the Snow conceivably would require very minimal personnel time without discrete financial expense. *Id.* at 613. It is not an exemption that would render Pennsylvania's welfare statutory scheme "unworkable." *See Sherbert*, 374 U.S. at 408-409. The minimal exemption in the present case, compared to the Government's unyielding claim of compelling interest, exposes the unconstitutional condition imposed by the Government on Appellees' sincerely held religious belief.

II.

The Appropriate Standard in This Case is the Compelling Interest-Least Restrictive Means Standard Enunciated in *Sherbert v. Verner*, Not the Balancing Approach Set Forth in *Wisconsin v. Yoder*.

Sherbert v. Verner, 374 U.S. 403 (1963), stands as the watershed case for establishing a lucid test of competing interests in the free exercise area. The "compelling state interest-least restrictive means" test announced in *Sherbert* has been successful in establishing a proper and workable balance between compelling Government inter-

---

(footnote 3 continued)

from the photograph requirement. *Id.* For example, the Government allowed learner's permits and special permits for minimal driving to be used without a photograph. *Id.* Therefore, the Government's interest in the public safety and administrative convenience had already been achieved through the lesser restrictive alternatives urged by Quaring. *Id.* Without probing into the credibility of Quaring's belief, the State would be imposing an unconstitutional condition upon the issuance of the license. *Id.* at 1127; *see also United States v. Ballard*, 322 U.S. 78, 85-88 (1944) (questions of truth or falsity of a religious belief properly withheld from a jury in a fraud case).

ests and individual religious liberty interests. Note, *United States v. Lee: An Insensitive Approach to the Free Exercise of Religion*, 18 Tulsa L.J. 305, 320 (1982) (hereinafter Note).

Sherbert's fresh approach to free exercise claims has survived any confinement to its particular facts. In *Wisconsin v. Yoder*, 406 U.S. 204 (1972), the Court reaffirmed the test, but further refined its application and scope by balancing an acknowleged compelling State interest against the sincerely held religious Amish belief. The State's interest in compulsory education was recognized as being at "the very apex" of the State's function. *Id.* at 213. However, the Court subjected this important State interest to a balancing test (*Id.* at 214) ruling that the only State interests that could overbalance legitimate free exercise claims were those of "the highest order and those not otherwise served." *Id.* at 215., (citing *Sherbert, supra*). As this Court viewed the State's interest in education, it realized that the interest's strength could not preclude comparison to other interests protected by the Constitution.*

After acknowledging the significance of universal education, this Court took judicial notice of Amish self-sufficiency learned through informal, vocational education and the impotency of two additional years of public education for preparing children for their way of life or

---

*The quality of Amish claim in *Yoder* required this Court to balance a neutral law's application advancing important State interests against undue individual discrimination infringing on individual religious liberty interests. 406 U.S. at 220. The Court's concern in *Yoder* for unconstitutional applications of a neutral law broadened *Sherbert*'s protection of free exercise, going beyond mere facial examination of a regulation and its underlying interest. *See* Note, *supra*, at 316, n. 74.

effective participation in society. *Id.* at 213-23. Finding an absence of proof supporting the magnitude of the State's risk in forfeiting two years of an Amish child's public education, and the existence of viable, less restrictive alternatives in the Amish tradition, history and way of life, the Court found that in the circumstances presented, even the compelling State interest in universal education was not sufficient to override the free exercise violation against the Amish.[9]

Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981), silenced any conceivable irreconciliation between the *Sherbert* compelling State interest-least restrictive means test and the *Yoder* balancing test. Relying on both *Sherbert* and *Yoder*, this Court reversed Indiana's denial of unemployment benefits to Thomas who had quit his job for religious reasons. *Id.* at 720.

After finding an infringement of a sincerely held religious belief, this Court looked for any justification of the incursion through a compelling interest-least restrictive

---

[9]The unique facts of *Yoder* and this Court's detailed emphasis on their embedded cultural and religious traditions has led some lower courts to confine Yoder's rationale. E.g. *Brown v. State*, 469 S.W. 2d 441 (Ark. 1984); *State v. Riviera*, 328 N.W.2d 220 (N.D. 1982); *West Virginia v. Riddle*, 285 S.E.2d 359 (W.Va. 1981); *Jernigan v. State*, 412 So.2d 1243 (Ala. 1982); *Delconte v. North Carolina*, 65 N.C. Ct. App. 262, 308 S.E.2d 898 (1983). However, the thorough enumeration of Amish traditions, history, and beliefs did not define the *sine qua non* for religious exemption in the free exercise area. Instead, this Court used the Amish model to illustrate the sincerity and the functional quality of their religious beliefs for purposes of comparison to the asserted State interests. Marcus, *The Forum of Conscience: Applying Standards Under The Free Exercise Clause*, 1973 Duke L.J. 1217, 1230.

means test. *Id.* This Court compared the State's interest in *Thomas* to the rejected interest in *Sherbert*, i.e., the integrity of the public insurance fund. *Id.* at 719, n. 12. Consequently, no compelling State interest was found that would justify the violation of Thomas' free exercise. *Id.*

In each of these three cases, a "'compelling State interest-least restrictive alternative'" test has been uniformly applied to determine the strength of the competing interests. *See* Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545, 546 (1983). *Yoder* goes one step further to require balancing to determine whether a compelling state interest, once found, is sufficient to override a bona fide free exercise claim.

A. The Court Applied The Correct Free Exercise Standard In The Present Case.

In this case, the lower court struck a middle ground between the parties when it labeled the governing standard as a "'reasonable less restrictive means'" test. 590 F. Supp. at 611. Acknowledging the Government's strong general interest in maintaining the integrity of the Social Security number, it nevertheless concluded that the Appellees would prevail if lesser restrictive alternatives could be used without unreasonable cost to the Government. *Id.* Superficially, the court below made reference to a cost/benefit analysis, but otherwise, the court's test resembled the conventional compelling interest-least restrictive means test.

Although the lower court did not discern whether all the available alternatives to the Social Security number were reasonable compared to others, nor actually employ a cost/benefit analysis (*id.* at 612-613), it did explore the exemption as one possible alternative and found the viability of the exemption to be well-founded because the

resulting harm to the State would be remote. *Id.* With a viable alternative existing, the State's denial of benefits could not *ipso facto* be the least restrictive means available to further its interest.

This type of analysis follows precisely the analysis in *Sherbert* and *Thomas*. The court analyzed the sincerity and credibility of Appellees' religious belief, the weight of the Government's interest, the irrelevance of administrative convenience, and the infringement of Appellees' free exercise of religion.* The Government's interest in using computer systems and the Social Security number was found to be substantial, not "essential" or compelling on its face. 590 F. Supp. at 610, 613. The chief reason why the Government's interest should not prevail is because there

---

*The *Yoder* balancing approach was not necessary in this case because of the absence of a compelling State interest. *Yoder* focused on the interplay between the interests because the implementation of an acknowledged compelling State interest was threatened, not merely the integrity of a lesser interest as in *Sherbert* and *Thomas*. In the latter two cases, this Court used a compelling interest-least restrictive means analysis because the religious exemption actually advanced the fundamental purpose of the public benefit laws. *See generally* Giannella, *Religious Liberty, Non-establishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1401 (1967). Similarly, in this case, the exemption for Appellee Roy would fulfill the Government's purpose of alleviating individual hardship. On the other hand, the *Yoder* approach went further and emphasized the depth of the Amish commitment to isolationism, and the ways in which the Amish practices actually advanced the State's interest rather than impeded it. The Court in all three cases searched for a compelling interest, but found one only in *Yoder*, thereby necessitating the further balancing of the state and individual religious liberty interests.

are lesser restrictive means available to practically achieve the goal of alleviating individual hardship as in *Sherbert* and *Thomas*. For example, the requirement of identifying factors for Little Bird of the Snow other than the Social Security number and the uniqueness of her name would supply the Government's need for exact identification. *Id.* at 613. In contrast to *Sherbert* and *Thomas*, these alternatives, in effect, a *partial* exemption, are more viable than wholesale exemption from participation in the Social Security system. As this Court has stressed, where there are alternatives acceptable to both parties, courts should always grant the exemption in favor of free exercise of religion.

[A] key phrase in *Sherbert*'s least restrictive means standard is that "no alternative forms . . . [exist to] combat [anticipated] abuses." 374 U.S. at 407. Essentially, this is the thrust of the "reasonable less restrictive alternatives" test in the lower court's analysis. This standard will not allow the Appellees to prevail unless the Government's interest cannot be substantially furthered in at least some other practical way.

The facts and the formulation of issues in the present case necessitate the use of the analysis set forth in *Sherbert* and *Thomas*. Appellees' application for benefits is to lessen the hardship on Little Bird of the Snow. The denial of these benefits is based solely on their religious practice of refusing to furnish Little Bird's social security number. 590 F. Supp. at 60[4]. As in *Thomas* and *Sherbert*, this denial creates an unconstitutional condition on the receipt of public benefits. Even the Government's interest in the integrity of the public benefit system is identical in these cases.

More importantly, Appellee Roy's belief is sincerely religious, central to his membership in the Native American Indian tradition and greatly affects his daily

life. Id. at 604-05. The quality of his claim equals or may surpass the claim of infringement in *Yoder*, 406 U.S. at 216. The Abenaki tradition of burying a child's placenta protects the child's autonomy. 590 F. Supp. at 604-05. Control is "indispensable to becoming a holy person." The use of computers would rob Little Bird of the Snow of that control. *Id.* Appellee Roy's belief is not one "so bizarre, so clearly nonreligious" as not to require protection. *Thomas*, 450 U.S. at 715. This belief is common to the Native American Indians, a culturally bound group older than the Amish. *See Yoder*, 406 U.S. at 210. Even the apparent inconsistency within Appellees' religious practices cannot defeat their claim. 590 F. Supp. at 610. Appellee Roy, as a father, has drawn a line for Little Bird of the Snow's welfare because of his religious belief. *Accord, Thomas*, 450 U.S. at 715. This line compelled Appellee Roy to sacrifice daily the benefits from the Social Security Administration. 590 F. Supp. at 610. Unlike the facts of *Yoder*, Appellee Roy attempts to live *in* a society "at odds" with his traditional religious beliefs. *Id.* Therefore, the nature of the benefits, Roy's conviction ,and his willingness to adapt to modern society like those involved in *Sherbert* and *Thomas*, require this Court to apply the analysis found in those cases.

B. Ad Hoc Balancing Is Inappropriate In This Case Because It Inadequately Values An Individual's Right To The Free Exercise Of Religion.

Mere balancing of competing interests is not appropriate in this case for a number of reasons. First, as in *Sherbert* and *Thomas*, there is no State interest of the "highest order." *See Thomas v. Review Board*, 450 U.S. at 718. Moreover, as the lower court in this case indicated, the mere formless balancing of particular facts "would

effectively guarantee victory for the government in every case." 590 F. Supp. at 611. Ad hoc balancing frames issues in broad terms that encourage subjectivity and is appropriate only for those cases involving the conflict of constitutional rights and obligations of the highest magnitude. *Yoder*, 406 U.S. at 213, 215; Marcus, *supra*, at 1240; *see also* Gianella, *supra*, at 1383-84; Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327, 330, 332 (1969).

In the absence of a potentially overriding governmental interest, some restraint is needed to stabilize the individual's interest against the State interest because it is more than mere coincidence "that the government usually prevails." Marcus, *supra*, at 1241. The compelling interest-least restrictive means test advanced by *Sherbert* best achieves a stable structure in the free exercise area requiring an evaluation of available alternatives, if any, to achieve the governmental objective. *Id.* Because administrative problems and efficiency constitute the core of the Government's interest in the present case(590 F. Supp. at 612, 613). The existence of workable administrative alternatives diminishes the Government's interests, and properly values Appellees' free exercise rights.

Second, a "balancing" test is inconsistent with the constitutional principle of recognizing exemptions from universally applied laws where the law conflicts with sincerely held religious beliefs. *Id.* at 611. This pitfall in a wholesale application of the balancing approach detracts from the consideration of valid individual rights of free exercise and the value of that right to the individual. Clark, *supra*, at 337. "The cost to a principled individual of failing to do his moral duty is severe, in terms of supernatural sanction or loss of moral self-respect." *Id.* Such is the plight of Appellees and their continued refusal to comply is more than inevitable. It is involuntary. Clearly, this Court should not depreciate Appellees'

belief, as the Government urges, through a blind invocation of a "balancing" test.

Finally, a balancing approach engenders dangerous generalizations that, in effect, often determine the outcome. Note, *supra*, at 333-334. For example, in *United States v. Lee*, 455 U.S. 252 (1982), this Court gave short shrift to the impact of Government's denial of a tax exemption on the religious practices of the Amish. Instead, the Court glossed over the probable impact on individual liberties, motivated by the "common good" derived from a system of taxation. 455 U.S. at 259. This somewhat indiscriminate approach cheapens the value of free exercise claims similar to Appellees'. Exceptional claims, like Appellees', should at least be entitled to consideration for constitutionally required exemptions granted after the most specific analysis available.

III.

United States v. Lee Is Inappropriate For The Resolution Of This Case.

The Government in this case relies primarily upon *United States v. Lee*, 455 U.S. 252 (1982) as dispositive of the issues. Indiscriminate application of *United States v. Lee*, however, ignores three significant distinctions between *Lee* and the present case. First, the factual pattern in *Lee* circumscribes its holding to issues involving *payment* or *nonpayment* of taxes. Second, the potential harm to the Government in *Lee* was immediate and concrete whereas any harm to the Government in this case, as the court below found, would be remote. 590 F. Supp. at 611-12. Third, the dominance of the tax issue in *Lee* is in stark contrast to the severity of the free exercise claim in this case. Note, *supra*, at 325.

A. The Facts of *Lee* Restrict Its Application To Claims Involving Exemption From Payment Of Taxes, Not To Claims For Governmental Benefits.

In *Lee*, a member of the Old Order Amish had hired other Amish to work with him in his carpentry shop and on his farm. Although Lee's income from self-employment was exempt from social security taxes under the provision for persons religiously opposed to public insurance (26 U.S.C. 1402(g) this exemption did not relieve him from tax liability for failure to withhold taxes assessed on employees' wages. Federal Insurance Contributions Act (F.I.C.A.), Pub. L. No. 591, 68A Stat. 415 (1954) (codified at 26 U.S.C. 3101-26); Federal Unemployment Tax Act (F.U.T.A.), Pub. L. No. 591, 68A Stat. 439 (1954) (codified at 26 U.S.C. 3101-11). Since 1970, *Lee* had failed to file the required quarterly returns, failed to withhold the F.I.C.A. tax from the employees' wages and failed to pay his share of the F.I.C.A. and F.U.T.A. excise tax. 455 U.S. at 254. Thereafter, the Internal Revenue Service assessed liability and Lee sued for a refund on the basis of a violation of his and his employees' free exercise of religion. 455 U.S. at 255.

The district court applied a "compelling interest-least restrictive means" test and upheld Lee's claim of unconstitutional restraint on his free exercise of religion. *United States v. Lee*, 497 F. Supp. 180, 184 (W.D. Pa. 1980). Specifically, the court found that the Government's loss of revenue would be negligible and that the Amish provided services for their members to displace the need for Government assistance. *Id.* at 183. Combining these two facts, the court held that the resulting burden on Lee's free exercise outweighed the Government's interest. *Id.*

On appeal, this Court reversed the district court after dismissing Lee's entitlement to the statutory exemption.

Therefore, the issue was whether Lee should be constitutionally exempt from the tax. This Court framed the initial inquiry in terms of whether the payment of social security taxes and receipt of benefits interfered with Lee's free exercise rights. After noting pertinent Amish beliefs and refusing to be "arbiter of scripture," the Court acknowledged perfunctorily that the compulsory participation in the tax system violated Lee's free exercise rights. 455 U.S. at 257 (*citing Thomas v. Review Board of Indiana Employment Security*, 450 U.S. 707, 716 (1981)).

Second, this Court recognized that the mere existence of a burden was not decisive, but that an "overriding government interest" could justify an infringement of Lee's free exercise. 455 U.S. at 257-58 [*] This Court concluded that the governmental interest in a nation-wide tax program based on complex actuarial factors was obvious. *Id.* Discussion of this "very high" interest disclosed the powerful influence of the tax undercurrent. Implicitly, the decision hinged upon the system's vitality because of its comprehensive and mandatory nature. *Id.*

Third, this Court inverted the free exercise analysis to determine whether Lee's belief would "unduly interfere" with the Government's interest. *Id.* at 259. Even though the Court acknowledged possible accommodation of religious beliefs, it specifically emphasized the difficulty in accommodating religious beliefs involving the payment of taxes. *Id.*, *quoting Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The Court noted that granting an exemption to the obligation to pay Social Security taxes is different because

---

[*] Somewhat surprisingly, the Court cited *Thomas* and *Sherbert v. Verner*, 374 U.S. 398 (1963), to support its reasoning. These cases, however, employed a "compelling interest-least restrictive means" standard to invalidates a burden on free exercise. Note, *supra*, at 321-20.

there is no principled distinction between payment of Social Security taxes and payment of taxes in general. As such, the entire revenue base of Government would be in jeopardy from a wide variety of religious beliefs.

The resolute indicia of *Lee*'s limited holding is apparent from this Court's expressed view of the facts in that case. In *Lee*, the Government's interest was to raise taxes from voluntary commercial activity not to compel the acceptance of benefits.[9] However, in the present case, the purpose of a Social Security number is for governmental convenience to guard against fraudulent claims or erroneous payments based on misidentification. 590 F. Supp. at 606-07. Needless to say, a religious exemption from paying taxes on a voluntary commercial activity contrasts sharply with a religious exemption from using a Social Security number to obtain welfare. In the present case, there is no evidence to indicate an unmanageable number of claims similar to Appellee Roy's. 590 F. Supp. at 612. Moreover, the Government has viable alternatives both to further its administrative objectives and to accommodate the religious beliefs. The alternative to a number would be simply to use Appellees' daughter's unique name, Little Bird of the Snow, or utilize other family member's numbers. Both interests of the parties would be assuaged because no evidence exists of another applicant named "Little Bird of the Snow." *Id.* at 613. Even assuming another does exist, the opportunity for fraud remains minimal due to the Government's requirement of other identification accompanying the applicant's name. *Id.* Moreover, Little Bird of the Snow epitomizes a "narrow category that is readily identifiable" for purposes of administrative manageability

[9]The Court described Lee's actions as a voluntary choice of entering a commercial venture and assuming the status and obligations of an employer. 455 U.S. at 261.

by virtue of her unique name and identifying factors. *See United States v. Lee*, 455 U.S. at 260-261.

Unlike the plaintiff in *Lee*, Appellee Roy's refusal to provide a Social Security number for Little Bird of the Snow generates, at most, a speculative adverse impact on the Government's interest in efficiency. Interface between the welfare program and computer necessitate the use of digital characters for efficiency. 590 F. Supp. at 610. However, the Federal Government requires the furnishing of Social Security numbers as a condition of eligibility for Government assistance. *Id.* at 605. This latter requirement implies that the number is needed for mere operation of the program (not just its efficiency). Yet, the welfare department admitted that it can distribute benefits and protect against fraud without using the computers. *Id.* at 613. Only one situation in an interstate context would generate difficulty and its occurrence is remote. *Id.* The Government's requirement of a Social Security number, although lessening the workload on the welfare department for its extensive welfare rolls, does not void the Government's interest in providing a welfare system, as an exemption from taxes in *Lee* would have eliminated part and threatened all of the tax system. The Government's interest in the present case, therefore, is greatly diminished in comparison to *Lee*.[9]

---

[9]Unlike Lee's free choice, Appellee Roy did not freely choose to participate in the issuance of a number to Little Bird of the Snow. After Little Bird of the Snow's birth, her mother signed an application for the number without Appellee Roy's knowledge and without remembering her actions. 590 F.Supp. at 604. Once the Social Security Administration issued the number, Appellees desired to revoke it, but instead the Administration rendered it "dormant." *Id.* Also, Appellee Roy refused to participate in the number's usage and willingly tried to offer an alternative to ameliorate the refusal, but the Government rejected any cooperative effort and denied the welfare benefits. *Id.* at 605.

The Government's inflated interest in administrative convenience pales beside Appellees' legitimate free exercise claim of caring for their daughter in the religious tradition of the Abenaki Indians. In *Lee*, the plaintiff freely chose to participate in a highly regulated activity. The Government had accommodated Lee's personal religious belief against *personal* payment of self-employer's income tax. However, Lee actually asserted objection to payment of taxes on behalf of *his employees*. 455 U.S. at 261-62. Even though the employees were Amish, it is unclear whether their beliefs paralleled Lee's Old Order Amish beliefs. *See* Mansfield, *The Religion Clauses of the First Amendment Amid the Philosophy of the Constitution*, 72 Calif. L. Rev. 847, 902 (1984). Indirectly, at least, this Court did not grant Lee a constitutional exemption because he did not have associational standing to assert employees' rights. *Id.*[10] By contrast, in this case Appellees' objections are not vicarious, but directly personal to them.

B. *United States v. Lee* Is *Sui Generis* As A Precedent In Free Exercise Cases.

In his concurrence, Justice Stevens observed three problems with this Court's test in *Lee* which suggests its uniqueness and limited application. *See* 455 U.S. at 262-63 (Stevens, J., concurring).

---

[10] *Accord, Jacobo Marti & Sons, Inc. v. NLRB*, 676 F.2d 975 (3rd Cir. 1982) (citing *Lee* in holding that a cheese producing plant employing both Amish and non-Amish could not prohibit unionizing because of Amish employees' religious tenets); *Tressler Ruthera Home for Children v. NLRB*, 677 F.2d 302, 306-07 (3rd Cir. 1982) (preventing unionization of Lutheran House would not violate non-Lutheran worker's right to unionize).

First, Appellees and Little Bird of the Snow represent a "limited class of disadvantaged persons" (*Id.* at 263, n. 3) who should not be judged with standards utilized for neutral laws of general applicability, but on a case-by-case exemption basis. Second, this Court in *Lee* extracted decisive factors from *Braunfeld v. Brown* and engendered a hybrid standard of review that is, in any event, inappropriate to this case. Note, *United States v. Lee: Limitation on the Free Exercise of Religion*, 28 Loyola L. Rev. 1216, 1223 (1982) (hereinafter *Limitations*). Third, the present case, like *Sherbert, and Thomas*, mandates a compelling interest-least restrictive means standard of review. 455 U.S. at 263, n. 3 (Stevens, J., concurring).

The grant of a religious exemption from neutral laws assumes a more justifiable approach when public welfare is at stake. *See generally* Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 Ky. L. J. 377 (1974). In this regard, it is not inappropriate to analyze the motivation for exemption from requirements imposed in connection with public benefits programs. 455 U.S. at 268, n. 3 (Stevens, J., concurring). In the present case the only motivation for Appellees' action consists of a free exercise claim amid a need to provide for Little Bird of the Snow. 590 F. Supp. at 605. Together, these two life forces signify personal freedom protected by the Constitution in the context of material need. *See generally* Smith, *The Constitution and Autonomy*, 60 Tex. L. Rev. 175 (1982); *Braunfeld v. Brown*, 366 U.S. at 614. (Brennan, J., dissenting). Appellee Roy's right to spiritual freedom amid his daughter's need for physical health place him in a limited class of the disadvantaged because of Roy's minority religious belief and his inability to adequately support his family without assistance. 590 F. Supp. at 604-07. Laws which grant public benefits to such persons arguably, in a context of material need, should be judged by a lesser standard of review than that announced in *Lee*.

Lee appears to have revived *Braunfeld*'s rationale despite this Court's emphatic support in *Lee* of the principles announced in *Sherbert* and its progeny. 455 U.S. at 259.; *see* Smith, *supra*, at 188. Justice Stevens indirectly offered a theory for reconciling *Braunfeld* and *Lee* with the *Sherbert* precedent by virtue of the economic motivation present in *Braunfeld* and *Lee*. 455 U.S. at 263, n. 3. As discussed, however, Appellee Roy's claim is purely one of free exercise unadulterated by tax issues or the right to earn a livelihood. The analysis of *Braunfeld and Lee*, is inappropriate because it employs a hybrid standard that is triggered because of potentially severe and adverse economic consequences inherent in any exemption from the right to earn a livelihood and the payment or nonpayment of taxes.

The present case, therefore, requires the *Sherbert* and *Thomas* standard of review. Several facts are relevant to determine whether the Government's interest is sufficiently compelling. Like Sherbert, Appellee Roy's willingness to comply with the law as closely as permitted by his belief is a critical factor in the analysis. *See* Note, *supra*, at 312, n. 47. Willingness to adhere to the Government's requirement does not suggest defiance of governmental authority. To the contrary, it suggests merely a sharp conflict between a personal constitutional right and the desire to maintain personal freedom in a complex, modern society. 590 F. Supp. at 610.

Like Thomas, Appellee Roy's benefits were conditioned upon required conduct prohibited by religious beliefs. *Accord* Note, *supra*, at 327. In *Thomas*, this Court held this to be unconstitutional because of the Government's compulsion of behavior modification for otherwise entitled benefits. 450 U.S. at 717-18.

Perhaps, the most significant and glaring example of the Government's unfairness to Appellees is the denial of life supporting benefits to their daughter. Appellees' entitle-

ment to welfare arguably surpasses even the interests in *Sherbert* and *Thomas*. In these two cases, the appellants had entered a chosen realm of employment activity. Appellees have not chosen anything but to apply for welfare benefits. Sherbert's and Thomas' choices could be compared to Lee's choice of commercial activity, but Roy cannot be compared to Lee in any manner. Therefore, the injury to Roy is more aggravated in comparison to the injuries suffered in *Sherbert* and *Thomas*.

As a pure free exercise case, *Roy* requires the *Sherbert* and *Thomas* compelling interest-least restrictive means standard of review. *Lee* is *sui genesis* to issues involving payment or nonpayment of taxes.

CONCLUSION

We live in an age when Government assumes it has an all-pervasive authority to intervene in virtually all phases of life. While the Government obviously has, in some cases, valid reasons for their conduct, such is not true in the present case.

The issue, however, goes further than the intervention involved. It touches the very heart of religious freedom and the right of parents and children to be let alone within the confines of the institution of the family.

Appellees' fundamental rights are at stake. These rights should not be contravened merely to make the Government's job a bit more convenient.

This Court must, therefore, reject the Government's specious arguments for violating Appellees' constitutional guarantees and uphold the rights of Appellees to be free from the Government entanglement involved in the pre-

sent case. As such, it is essential that the decision below be affirmed.

Respectfully Submitted,

John W. Whitehead
Counsel of Record
James J. Knicely
D. Kevin Ikenberry
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

Thomas O. Kotouc
The Rutherford Institute
of Alabama
Box 59561
Birmingham, Alabama 35259

Wendell R. Bird
William B. Hollberg
The Rutherford Institute
of Georgia
622 Candler Building
127 Peachtree St., N.E.
Atlanta, Georgia 30303

Tony Trimble
The Rutherford Institute
of Minnesota
316 East Main
Anoka, Minnesota 55305

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Les Bailey
The Rutherford Institute
of Tennessee
710 East Sullivan Street
Kingsport, Tennessee 37660

W. Charles Bundren
The Rutherford Institute
of Texas
4300 Interfirst One
Dallas, Texas 75202

Guy O. Farley, Jr.
The Rutherford Institute
of Virginia
10521 Judicial Place
Fairfax, Virginia 22030